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No. 81-1005

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

J. S. ALBERICI CONSTRUCTION COMPANY, INC.,
Petitioner,

vs.

CLYDE L. SISCO,
Respondent.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals For the Eighth Circuit

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CITATIONS TO OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals challenged by Petitioner J.S. Alberici Construction Company, Inc. is reported *Sisco* v. *J.S. Alberici Construction Company, Inc.*, 655 F.2d 146 (8th Cir. 1981). Alberici's petition contains numerous references to the decision in *Setser* v. *Novak Investment Company*, 638 F.2d 1137 (8th Cir. 1981) (a/k/a Setser I) and 657 F.2d 962 (8th Cir. 1981) (*en banc*) (a/k/a Setser II) wherein, subsequent to the submission of Petitioner Alberici's Petition herein, this Court denied the employer's Petition for a Writ of Certiorari. *Novack Investment Co.* v. *Setser*, ____ U.S. ____ (No. 81-646, Decided November 16, 1981), 50 U.S.L.W. 3401.

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* Pursuant to Rule 28 of this Court, J. S. Alberici Construction Company, Inc. states that it has no parent companies, partially owned subsidiaries or affiliated companies.

STATEMENT OF THE CASE

J. S. Alberici Construction Company, Inc. objects to the allegations in the statement of the case proposed by Sisco that "...Alberici prematurely shut down the post office project and transferred all other iron workers to other work sites. [and] ... after Mr. Sisco's separation from the job site, Alberici resumed work on the site and reassigned a young black apprentice iron worker to the site." These statements are simply not supported by the opinion of the District Court (*see* paragraphs 15 through 36 of the Findings of Fact of the District Court; Cross-Petitioner's Appendix A14-A18).

Alberici would respectfully submit to this Court that the statement of facts contained in its previously filed petition for writ of certiorari (No. 81-795) is a fair and proper statement of the case.

SUMMARY OF ARGUMENT

The Court of Appeals was correct in holding that a claim for damages under 42 U.S.C. § 1981 is subject to a legal defense based upon the employer's lawful conduct under a specifically sanctioned job action plan since the cross-petitioner Clyde L. Sisco has advanced neither case authority nor factual basis for this Court to uncompromisingly apply its holding in *McDonald* v. *Sante Fe Trail Transportation Company,* 427 U.S. 23 (1976) in light of this Court's specific statement in *United Steelworkers of America* v. *Weber,* 443 U.S. 193 (1979) that in the context of affirmative action plans reliance upon *McDonald* is misplaced. (443 U.S. at 196). Equally proper is the holding of the Court of Appeals that the application as an affirmative defense of job action plan was a legal determination for the trial court and not a factual issue for the jury. Neither the argument of Clyde L. Sisco nor the authority relied upon by him in any way suggests that the consideration of purely legal issues by the trial court such as the implementation of a private contract between two parties designed to eradicate past racially improper conduct is a legal issue to be tried by a jury.

ARGUMENT

A. The Court Of Appeals Was Correct In Holding That A Claim For Damages Under 42 U.S.C. § 1981 Is Subject To A Legal Defense Based Upon The Employer's Lawful Conduct Under A Specifically Sanctioned Job Action Plan.

As understood by the petitioner/cross-respondent J. S. Alberici Construction Company, Inc. (Alberici) the cross-petitioner/respondent Clyde L. Sisco (Sisco) would have this Court emasculate its holding in *United Steelworkers of America* v. *Weber,* 443 U.S. 193 (1979) by use of the post-Civil War Civil Rights Acts (42 U.S.C. § 1981 *et seq.*) Sisco appears to desire the creation of a coexistent cause of action for damages for conduct of an employer even though such conduct has been specifically held to be lawful under the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000(e) *et seq.*).

To invite this Court to hold that its decision in *Weber* is of no force whenever a cause of action is alleged under § 1981 is a return to the same type of legal logic and scholarship that resulted in the now discredited *renvoi* theory in choice of law decisions. The "mischievous results" of law so soundly condemned by this Court in *Erie Railroad Co* v. *Tompkins,* 304 U.S. 64, 74 (1938), in another context, will again stalk the land if the argument of Sisco is adopted. The respondent/cross-petitioner is advocating at the least, statute-shopping, where the liability of a defendant would turn on the choice of the statutory remedy picked by a plaintiff.

Sisco's reliance upon this Court's language and logic in *McDonald* v. *Santa Fe Trail Transportation Company,* 427 U.S. 273 (1976) and *Weber, supra* is simply not supported by the language contained within the specific references made by Sisco. Significant by its absence from anywhere within respondent/cross-petitoner's argument is any citation of any authority by which this Court's language that:

> "...the...plan is an affirmative action plan voluntarily adopted...to eliminate traditional patterns of racial segregation..." 443 U.S. at 196

can be avoided. As in *Weber*;

> "In this context respondent's reliance upon a literal construction of ... *McDonald* is misplaced." 443 U.S. at 196.

The situation prsented here is the mirror image of the issue presented in *Weber*. The instant case involves a plan with Sisco's employer and union which had the same goals as the affirmative action plan specifically sanctioned in *Weber*.

The respondent/cross-petitioner may desire that this Court reverse its holding in *Weber* but he has not prayed for such a reversal in his cross-petition and has advanced neither cogent reason nor compelling necessity for such a reversal. The opinion of the Court of Appeals in its application of the law to Sisco's § 1981 cause of action was proper.

B. The Court Of Appeals Properly Denied A Jury Trial On Legal Issues Relating To The Employer's Affirmative Defense Of An Affirmative Action Plan.

In an attempt to overturn the well founded portion of the opinion of the Court of Appeals that the existence of a proper affirmative action plan was a question of law to be determined by the trial judge, the respondent/cross-petitioner attempts to convert these legal issues into specious factual questions.

It must be remembered that Alberici's affirmative action effort is, as recognized by this Court in *Weber*, a method used to eliminate traditional patterns of racial segregation. Such a plan should be considered in terms of its interpretation by the trial judge no differently than a dispute involving a contract between two parties. The interpretation and existence of such contract

issues has traditionally been held to be a question of law for the trial judge. The interpretation and effect of contracts has consistently, since common law, been held to be questions of law not fact. *See e.g. Arnott* v. *American Oil Co.*, 609 F.2d 873 (8th Cir. 1979), *cert. denied* 446 U.S. 918 (1980); and *Yentsch* v. *Texaco, Inc.*, 630 F.2d 46 (2d Cir. 1980). Thus, when carefully examined, the argument of the respondent/cross-petitioner concerning the alleged trammeling of his Seventh Amendment right to jury trial is no different than any other lawsuit involving a contract between private litigants. It stretches logic to argue that merely because two parties seek to eradicate prior unconstitutional actions that the interpretation of that parties' plan can be elevated to a Seventh Amendment controversy.

Equally misplaced is Sisco's reliance on the decision of *Curtis* v. *Loether*, 415 U.S. 189 (1974). There the aggrieved party was totally denied a jury trial on the issue of damages under Title VIII of the Civil Rights Act of 1968 (42 U.S.C. § 3612). The opinion of the Court of Appeals delineating what questions of law are to be determined by a District Judge does no damage to the rule of law enunciated in *Curtis* v. *Loether*.

Merely because Sisco desires to submit Alberici's affirmative action plan to a jury cannot create a Seventh Amendment issue from such loosely woven cloth.

The application of legal rather than factual principles by the Court of Appeals to Alberici's affirmative action plan was proper.

CONCLUSION

The cross-petition of Clyde L. Sisco does not raise any important question of Federal law that should be settled by this Court. The opinion of the Court of Appeals was proper on the issues purportedly raised by the cross-petition and the petition should therefore be denied.

Respectfully submitted,

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